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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/566,812	01/25/2007	William Stringfellow	QST.P.US0002	8016
7590 10/09/2008				
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EXAMINER				
BROWN, COURTNEY A				
ART UNIT		PAPER NUMBER		
1616				
MAIL DATE		DELIVERY MODE		
10/09/2008		PAPER		

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Advisory Action
Before the Filing of an Appeal Brief

Application No.

10/566,812

Applicant(s)

STRINGFELLOW, WILLIAM

Examiner

COURTNEY BROWN

Art Unit

1616

--The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

THE REPLY FILED 19 September 2008 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE.

1. ☒ The reply was filed after a final rejection, but prior to or on the same day as filing a Notice of Appeal. To avoid abandonment of this application, applicant must timely file one of the following replies: (1) an amendment, affidavit, or other evidence, which places the application in condition for allowance; (2) a Notice of Appeal (with appeal fee) in compliance with 37 CFR 41.31; or (3) a Request for Continued Examination (RCE) in compliance with 37 CFR 1.114. The reply must be filed within one of the following time periods:

- a) ☒ The period for reply expires 3 months from the mailing date of the final rejection.
b) ☐ The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection.
Examiner Note: If box 1 is checked, check either box (a) or (b). ONLY CHECK BOX (b) WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

NOTICE OF APPEAL

2. ☐ The Notice of Appeal was filed on _____. A brief in compliance with 37 CFR 41.37 must be filed within two months of the date of filing the Notice of Appeal (37 CFR 41.37(a)), or any extension thereof (37 CFR 41.37(e)), to avoid dismissal of the appeal. Since a Notice of Appeal has been filed, any reply must be filed within the time period set forth in 37 CFR 41.37(a).

AMENDMENTS

3. ☐ The proposed amendment(s) filed after a final rejection, but prior to the date of filing a brief, will not be entered because
(a) ☐ They raise new issues that would require further consideration and/or search (see NOTE below);
(b) ☐ They raise the issue of new matter (see NOTE below);
(c) ☐ They are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or
(d) ☐ They present additional claims without canceling a corresponding number of finally rejected claims.

NOTE: _____. (See 37 CFR 1.116 and 41.33(a)).

4. ☐ The amendments are not in compliance with 37 CFR 1.121. See attached Notice of Non-Compliant Amendment (PTOL-324).
5. ☐ Applicant's reply has overcome the following rejection(s): _____.
6. ☐ Newly proposed or amended claim(s) _____ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).
7. ☐ For purposes of appeal, the proposed amendment(s): a) ☐ will not be entered, or b) ☐ will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.
The status of the claim(s) is (or will be) as follows:
Claim(s) allowed: _____.
Claim(s) objected to: _____.
Claim(s) rejected: _____.
Claim(s) withdrawn from consideration: _____.

AFFIDAVIT OR OTHER EVIDENCE

8. ☐ The affidavit or other evidence filed after a final action, but before or on the date of filing a Notice of Appeal will not be entered because applicant failed to provide a showing of good and sufficient reasons why the affidavit or other evidence is necessary and was not earlier presented. See 37 CFR 1.116(e).
9. ☐ The affidavit or other evidence filed after the date of filing a Notice of Appeal, but prior to the date of filing a brief, will not be entered because the affidavit or other evidence failed to overcome all rejections under appeal and/or appellant fails to provide a showing a good and sufficient reasons why it is necessary and was not earlier presented. See 37 CFR 41.33(d)(1).
10. ☐ The affidavit or other evidence is entered. An explanation of the status of the claims after entry is below or attached.

REQUEST FOR RECONSIDERATION/OTHER

11. ☒ The request for reconsideration has been considered but does NOT place the application in condition for allowance because:
See Continuation Sheet.
12. ☐ Note the attached Information Disclosure Statement(s). (PTO/SB/08) Paper No(s). _____.
13. ☐ Other: _____.

/Mina Haghighatian/
Primary Examiner, Art Unit 1616

Continuation of 11, does NOT place the application in condition for allowance because: Applicant's arguments filed on September 19, 2008 have been fully considered but they are not persuasive. Applicant argues that the claimed method is not directed toward the application of a fungicide to a tree and is instead directed toward the application of an insecticide or a plant growth regulator to a tree. However, claim 1 requires applying a "fungicide" to a tree comprising applying an aqueous insecticide or plant growth regulator composition to the bark periderm of woody plants (see claim 1 of instant application).

Next, Applicant also argues that, in reference to the 37 CFR 1.132 Declarations of Todd O'Connell and Franklin E. Sexton, the Examiner must consider the nature of the material sought to be established. A Applicant argues that even if the submitted Declarations of Todd O'Connell and Franklin E. Sexton are merely opinion affidavits, they cannot be simply disregarded and must afford some patent weight. Additionally, Applicant argues that said affidavits provide objective evidence. In particular, Applicant points to the fact that Todd O'Connell states at paragraph 7 that "those skilled in the art understand that the types of organosiloxane surfactants described in Mr. Stirlingfellow's application (particularly the ethoxylated versions thereof) would be incompatible with oil-based compositions." However, the secondary teaching of Esposito was bought in to show that the use of insecticides for penetrating tree bark was known at the time of the instant invention. Hence, whether the formulation being aqueous or an oil dilutant would not preclude one of ordinary skill from its selection. Also, Applicant argues that the Declaration of Franklin E. Sexton provides strong evidence of non-obvious to the extent that it expresses his skepticism (thereby undermining predictability) as one of skill in the art. However, the Examiner maintains that it would have been obvious to one of ordinary skill in the art at the time of the invention was made to combine the teachings of Riego et al., Esposito, and Hofer et al. to devise a method for applying a fungicide to a tree comprising applying an insecticide or plant growth regulator composition to the bark periderm of woody plants without mechanically penetrating or piercing the bark of the plant. Riego et al. teach a herbicidal composition applied to bark in basal (bark periderm) and dormant stem regions of plants (abstract) without mechanical penetration. Specifically, Riego et al. teach a composition that preferably comprises about 5-35% by weight polyoxyethylene heptamethyl trisiloxanes (column 3, lines 6-8 and column 5, line 33); 50-95% of a glycol or glycol ester such as diethylene glycol and propylene glycol (column 3, lines 22-25 and column 5, lines 50-52), and "pour point depressants" (solvents) such as methanol, ethanol, and n-propanol (column 7, lines 46-52). Esposito teaches a diluent composition which includes the use of insecticides and is capable of penetrating tree bark and woody plant tissue (abstract) and Hofer et al. teach a flowable composition comprising acetamiprid for controlling harmful insects (abstract). One would be motivated to combine these teachings because herbicides and insecticides are both classified as pesticides and are used to control organisms which are considered harmful to trees.